Supreme Court of the United States.

OCTOBER TERM, 1976.

No. 75-1527

JOHN P. DOHERTY, ET AL.,
INTERVENORS-PETITIONERS,

v.

TALLULAH MORGAN, ET AL.,
PLAINTIFFS-RESPONDENTS,
AND
JOHN J. McDONOUGH, ET AL.,
DEFENDANTS-RESPONDENTS.

Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit.

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April, 1976.

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Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit.

Intervenors-Petitioners (hereinafter "Teachers Union") petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the First Circuit.

Opinions Below.

The opinion of the Court of Appeals for the First Circuit affirming the District Court's Order as to teacher hiring is not reported at this time; the slip opinion is annexed as appendix A (at pp. 13-21). The memorandum and orders on faculty recruitment and hiring of the

District Court for the District of Massachusetts are reported at 388 F. Supp. 581 (D. Mass. 1975) and are set forth as appendix B (at pp. 22-30).

The order of the District Court allowing the Teachers Union's intervention is unreported and is annexed as appendix C (at pp. 31-32).

Jurisdiction of this Court.

The judgment of the Court of Appeals was entered on January 26, 1976.

This Court has jurisdiction to review the judgment of the United States Court of Appeals pursuant to 28 U.S.C. § 1254(1).

Questions Presented.

I. Is a federal court order in a public school student desegregation case requiring the establishment of teaching staff racial parity through a quota based on gross population percentages erroneous?

II. Is a federal court order in a public school student desegregation case requiring that teacher hiring be conducted on a one-to-one racial basis erroneous?

Relevant Constitutional and Statutory Provisions.

There is involved the Fourteenth Amendment to the Constitution of the United States of America, section 1, which states:

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State

deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Statement of the Case.

A. Basis of Federal Jurisdiction.

Jurisdiction in the United States District Court for the District of Massachusetts is predicated upon 28 U.S.C. § 1343 and 42 U.S.C. §§ 1981, 1983 and 2000d.

B. Prior Original and Appellate Proceedings.

The plaintiffs-appellees are representative black parents and public school students who initiated a suit resulting in a finding of intentional racial segregation in the operation of Boston's public schools including teacher recruitment and staffing activities. *Morgan* v. *Hennigan,* 379 F. Supp. 410, 456-466 (D. Mass. 1974), affd. *sub nom. Morgan* v. *Kerrigan,* 509 F. 2d 580, 595-598 (1st Cir. 1974), cert. den. 421 U.S. 963 (1975). A previous order of the District Court containing hiring provisions but effective only for the 1974-1975 academic year was affirmed in *Morgan* v. *Kerrigan,* 509 F. 2d 599 (1st Cir. 1975). By order of the District Court entered February 25, 1976, the caption of the case in that court was amended to *Tallulah Morgan* v. *John J. McDonough.* On April 9, 1976, other defendants—the school committee for the city of Boston and its members—filed a petition for certiorari under the caption *John J. McDonough, et al.* v. *Tallulah Morgan, et al.* Another defendant—the mayor of Boston—also filed a petition for certiorari on that same date, *sub nom, Kevin White, Mayor* v. *Tallulah Morgan, et al.*

As far as the Teachers Union petitioners are aware, neither the school committee nor the mayoral petition addresses the questions presented by this petition.

C. The Teacher Hiring Orders.

On January 28, 1975, the District Court entered a memorandum and orders on faculty recruiting and hiring, which provides that if the city of Boston School Committee finds that the racial composition of the school department's full time staff at any of three grade levels (K-5, 6-8, 9-12) is less than 20 per cent black, a shortage of black teachers exists. The School Committee is required to hire one black permanent teacher for each white permanent teacher hired and one black provisional teacher for each white provisional teacher hired until the percentage of black faculty at each such grade level meets the quota.[1] The quota chosen by the District Court represents approximately the percentage of blacks in Boston's total population; and that population percentage is acknowledged to be the basis for the order's quota.

The order establishes certain minimum qualifications for teacher candidates including a requirement that the proposed teacher must be able to qualify for Massachusetts teachers certification. Certification issuance is administered by the board of education of the Commonwealth of Massachusetts, pursuant to Massachusetts General Laws, c. 71, § 38G, as most recently amended by St. 1973, c. 847, § 5, which also enacts requirements for certification eligibility including possession of a bachelor's degree or an earned higher academic degree or approved normal school graduation. Eligibility may also depend upon an applicant's completion of further requirements as to courses of study, semester hours, experience, and advanced academic achievement.[2]

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[1] The distinction between permanent teacher and provisional teacher is irrelevant for the purposes of this Petition.

[2] G.L. c. 71, § 38G, is annexed as appendix E (at pp. 35-41).

D. The Area Population: (1) The Availability of Qualified Persons and (2) Labor Force Oversupply.

(1) The 1970 United States Census shows: (a) 5.8 per cent of all teachers residing in Boston were black (432 out of 7,451); (b) 1.3 per cent of all teachers residing in Massachusetts were black (1,000 out of 78,431); and, (c) 3.81 per cent of all teachers residing in New England, New York and New Jersey were black (19,300 out of 506,879).

The Census further informs that: (a) in 1970, black adults residing in Boston who were at least 25 years old and who had completed at least four years of college constituted 5.25 per cent of all such adults residing in Boston (1,900 out of 36,245); (b) in 1970, black adults residing in Massachusetts who were at least 25 years old and who had completed at least four years of college constituted 1.11 per cent of all adults residing in Massachusetts (4,370 out of 394,470); and, (c) in 1970, such black adults residing in New England, New York and New Jersey constituted 4.24 per cent of all such adults in that area (106,136 out of 2,507,492). While teacher hiring is not usually done among persons 25 years or older, these statistics as to college completion demonstrate the relative availability within the general population of persons possessing specialized qualifications.

The most favorable statistical projections as to the percentage of blacks among recent college graduates in the Boston area do not extend beyond a conclusion of 13 per cent: the national percentage of black persons attending college rose from 5 per cent in 1964 to 8.7 per cent through 1972, and extension of the rate of increase to 1975 yields a result that about 12 per cent to 13 per cent of such persons are black. Further, in September, 1972, the department's minority recruiter testified that there

were not many qualified black teachers in the Boston area.

(2) Massachusetts colleges produce over 16,000 eligible teachers annually. The bureau of teacher certification and placement, the division of the board of education administering the board's certification duties, issued a total of 21,851 teaching certificates in 1973, of which 16,500 were initial certifications. Of that number of persons initially certified, 10,780 were not employed professionally in the public schools of Massachusetts, while the scope of the teacher oversupply was disputed, it was recognized that such an oversupply existed.[3]

E. Recruitment Results.

On July 31, 1974, the District Court entered an order on teacher hiring limited in its terms to the academic year commencing September, 1974, affd. *sub nom, Morgan* v. *Kerrigan*, 509 F. 2d 599 (1st Cir. 1975). Pursuant to that order an extensive and intensive recruitment effort yielded a net gain of 185 black teachers when 819 new teachers were added to a faculty staff of approximately 5,300 teachers less than the number of black teachers needed to meet the 1974 order.

Following entry of the 1975 order, the Boston School Department reported on its spring, 1975, recruitment efforts at out-of-state and at local colleges. Out-of-state recruitment interviews numbered 199, of whom 150 interviewees were blacks. Local college visits produced "contacts" numbering 762, of whom 97 are reported as black "contacts."

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[3] There is reproduced from the record as appendix D, the "Highlights of the Study," *Teacher Supply and Demand*, Massachusetts Teacher Association, 1974, which demonstrates the severe degree and intensity of the competition among candidates for employment in available vacancies and new teaching positions.

Reasons for Grant of the Writ.

The Court of Appeals Decision Is in Conflict with Applicable Decisions of this Court and has Decided an Important Question of Federal Law Which has Not been, but should be, Settled by this Court.

This petition raises important questions as to the development of remedies imposing affirmative staffing remedies designed to secure statistical parity of teaching staffs. The petition also presents the critical issue of the propriety of a grant of superior right to public employment based exclusively on race to persons not identified as specific victims of discriminatory hiring practices. These issues are presented in the context of a school desegregation case but the principles to be established apply to the administration of the national policy against racial discrimination.

I. The Establishment of Parity in Teacher Staffing on the Basis of Gross Population Statistics Is Inconsistent with Applicable Decisions of this Court and Presents a Conflict between Courts of Appeal.

The District Court's acceptance of the approximate black percentage of Boston's total population as the quota goal of its hiring order is incorrect.

The petitioner Union recognizes that this litigation involves the rights of black parents and students to remedies for constitutional violations. However, their remedies must be "necessarily designed, as all remedies are, to restore the victims of discriminatory conduct to the position they would have occupied in the absence of such conduct." *Milliken* v. *Bradley*, 418 U.S. 717, 746 (1974). In view of the scarcity in the northeastern United States

of blacks possessing the minimum bachelor's degree qualification (a scarcity extending into the Boston area), the imposition of a quota relying on artificial and unrealistic premises is not consistent with *Milliken, supra*: the automatic application of a 20 per cent quota confers more than restoration of the staffing condition which would have existed absent hiring discrimination.

The gross population statistic's use is clearly wrong in view of the special employment qualifications: the "relevant universe" for definitional purposes should consist at most of those persons possessing this college degree qualification; all citizens are simply not "fungible" for that purpose. Cf. *Mayor of Philadelphia* v. *Educational Equality League*, 415 U.S. 605, 620-621 (1974).

Other circuits recognize the validity of the proposition that general population statistics are useless in establishing quotas if positions for employment require special qualifications beyond those shared by the general population. *Rios* v. *Enterprise Association Steamfitters, Local 638 of U.A.*, 501 F. 2d 622 (2d Cir. 1974), and *Hester* v. *Southern Railway Company*, 487 F. 2d 1374, 1379 n.6 (5th Cir. 1974); see *Kirkland* v. *New York State Department of Correctional Services*, 520 F. 2d 420, 428 (2d Cir. 1975).

There is more than mathematical consistency at stake in establishing the relevant accurate percentage basis if affirmative relief as was here directed is proper. As *Rios* aptly states at 633, *supra*:

> "from the outset the court should be guided by the most precise standards and statistics available in view of the delicate constitutional balance that must be struck in the use of such goals or quotas between the elimination of discriminatory effects, which is permissible, and the involvement of the court in unjustifiable 'reverse racial discrimination' which is not."

The risk of disturbance to that balance is high and immediate in the present case. Insofar as the quota is statistically disproportionate, capable non-black candidates will be given secondary consideration by an employer compelled to satisfy the mandate. Employment decisions become racial decisions. And non-black candidates are victimized by new priorities imposed by statistics which lack justification.

There is another burden unique to non-black candidates competing for hire in this period of severe teacher underemployment in the Boston area. That job competition aggravates the wrong of mandating a statistically unwarranted quota: the use of an improper percentage allocates greater risk of unemployment to non-black candidates, rather than sharing the burdens of past discrimination among all members of the pool, Cf. *Franks* v. *Bowman Transportation Company, Inc.*, no. 74-728, U.S. S. Ct., March 24, 1976, slip opinion, p. 28.

Statistical parities in teacher staffing are neither "feasible" nor "practical," given the racial proportions of the relevant labor pool. In so directing such parity the District Court and Court of Appeals ignore and fail to "take into account the practicalities of the situation" as *Davis* v. *Board of School Commissioners of Mobile County*, 402 U.S. 33, 37 (1971), directs. And insistence on statistical parity is specifically disapproved. *Swann* v. *Charlotte-Mecklenburg Board of Education*, 402 U.S. 1, 24 (1971).

In the present record there is a sufficient basis for establishing a quota based on the racial composition of the available college educated labor pool from which teachers are hired. If any hiring quota can be sanctioned, such a quota would be substantially less than one based on a gross population percentage and would provide the feasible and compensatory remedy to which the plaintiff par-

ents and students may be entitled if their remedy rights include preferential teacher hiring.

II. The Establishment of a Superior Right to Employment Based Exclusively on Race Creates an Unlawful Preference.

The provisions of the hiring order do not provide relief to identifiable applicants denied employment because of the Boston School Department's practices. See: *Franks* v. *Bowman Transportation Company, Inc., supra,* slip opinion, p. 1. The terms of the one-to-one provisions favor one candidate over another equally qualified or even superior candidate solely on the basis of the former candidate's race. It is an anomaly to declare that "[o]ur Constitution is color-blind and neither knows nor tolerates classes among citizens . . . [who] are equal before the law," *Plessy* v. *Ferguson,* 163 U.S. 537, 559 (1896) (Harlan, J., dissenting), and to proscribe official racial classifications subversive of the principle of equality mandated by the Constitution, *Loving* v. *Virginia,* 388 U.S. 1, 12 (1967), while permitting preferences in employment favoring members of one race over another. Indeed this Court has sustained state injunctions directed against picketing to compel racial preferences in employment decisions. *Hughes* v. *Superior Court,* 339 U.S. 460 (1950).

No candidate for employment should be permitted any advantage based upon race. As a measure of qualification, race is and will continue to be a capricious and irrelevant factor. And candidates for employment should be evaluated and selected on their individual merits in a racially neutral manner, absent an individual candidate's victimization by some unlawful hiring act. Cf. *DeFunis* v. *Odegaard,* 416 U.S. 312, 337 (1974) (Douglas, J., dissenting).

Conclusion.

This petition for writ of certiorari to the Court of Appeals for the First Circuit should be granted.

Respectfully submitted,

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April, 1976.

Appendix A.

United States Court of Appeals for the First Circuit.

No. 75-1097

TALLULAH MORGAN, et al.,
PLAINTIFFS, APPELLEES,

v.

JOHN J. KERRIGAN, et al.,
DEFENDANTS, APPELLEES,

AND

JOHN P. DOHERTY, et al.,
INTERVENORS-APPELLANTS

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

[388 F. Supp.518]
(Hon. W. Arthur Garrity, Jr., *U.S. District Judge*)

Before Coffin, *Chief Judge*,
McEntee and Campbell, *Circuit Judges*.

John F. McMahon, with whom *Angoff, Goldman, Manning, Pyle and Wanger* was on brief, for appellants.

John Leubsdorf, with whom *Laurence S. Fordham, Foley, Hoag & Eliot, J. Harold Flannery, Robert Pressman, Eric E. Van Loon, Rudolph F. Pierce, Keating, Perretta & Pierce, Roger I. Abrams, Thomas M. Simmons*, and *Nathaniel R. Jones* were on brief, for plaintiffs, appellees.

January 26, 1976

COFFIN, *Chief Judge.* This is an appeal arising out of the Boston school desegregation litigation, in which intervenors, representing the Boston Teachers Union, challenge a district court order fixing goals governing teacher recruitment and hiring in the Boston public schools. *Morgan* v. *Kerrigan,* 388 F. Supp. 581 (D. Mass. 1975). Plaintiffs-appellees are the class of black parents and school children which initiated the suit,[1] resulting in a finding of intentional segregatory policies affecting, among other parts of the school system, the recruitment and hiring of black teachers. *Morgan* v. *Hennigan,* 379 F. Supp. 410, 456-66 (D. Mass. 1974), *aff'd sub nom. Morgan* v. *Kerrigan,* 509 F.2d 580, 595-98 (1st Cir. 1974), *cert. denied,* 421 U.S. 963 (1975). A previous teacher hiring order containing a one-for-one hiring provision similar to that in the instant case, but effective only for the 1974-1975 school year, was affirmed in *Morgan* v. *Kerrigan,* 509 F.2d 599 (1st Cir. 1975).

The district court ordered Boston school officials to hire one black teacher for each white teacher hired until 20 percent of the faculty was black. The union objects to this 20 percent figure,[2] which was selected by the district court as representing approximately the percentage of blacks in the total Boston population. The union argues

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[1] The other parties to the litigation, including the School Committee, the Mayor and other city officials, and the state Board of Education, are not parties to this appeal.

[2] The union also suggests that the one-for-one hiring ratio is an unlawful racial preference, citing *DeFunis* v. *Odegaard,* 416 U.S. 312 (1974) (Douglas, J., dissenting). This argument, however valid it may be as a general proposition, has no application where substantial constitutional violations have been found. The cases cited in the textual discussion, *infra,* are only a few of many attesting to the propriety of remedial hiring orders along the general lines of that promulgated below.

that the goal should instead be cast in terms of the labor pool of present college students and recent graduates in the Boston area.

This argument fundamentally misapprehends the nature of this case. The plaintiffs are not the black teachers or would-be teachers who have been discriminated against because of their race. The district court's examination of the School Committee's recruitment, hiring, transfer and promotion policies was undertaken to determine whether those policies violated the rights of black Boston public school children. It is the rights of those children that the order in issue is intended to protect. *See Morgan* v. *Kerrigan,* 509 F.2d 599, 600 (1st Cir. 1975). In its effort to eliminate segregation and its effects "root and branch", *Green* v. *County School Board,* 391 U.S. 430, 438 (1968), the court's equitable power to fashion a remedy is both broad and flexible. *Swann* v. *Charlotte-Mecklenburg Board of Education,* 402 U.S. 1, 15 (1971).

With this objective in mind, some courts have set as a teacher hiring goal the percentage of minority students in a given school system, which for Boston in 1973-74 was 35 percent. *See, e.g., Keyes* v. *School District No. 1,* 521 F.2d 465, 484 (10th Cir. 1975); *United States* v. *Texas Education Agency,* 467 F.2d 848, 868, 873 (5th Cir. 1972); *Arvizu* v. *Waco Independent School District,* 373 F. Supp. 1264, 1270-71 (W.D. Tex. 1973), *rev'd in other respects,* 495 F.2d 499 (5th Cir. 1974). The court's refusal to do so here was apparently motivated at least in part by a desire to minimize court involvement over a period of time.

The 20 percent goal fixed by the district court finds support in hiring discrimination cases not involving students' rights, where courts have often resorted to gross population ratios for remedial purposes. *See, e.g., Boston*

Chapter, NAACP v. *Beecher,* 504 F.2d 1017, 1026-27 (1st Cir. 1974), *cert. denied,* 421 U.S. 910 (1975); *NAACP* v. *Allen,* 493 F.2d 614, 617 & n. 3, 621 (5th Cir. 1974); *Carter* v. *Gallagher,* 452 F.2d 315, 328 & n. 2, 330-31 (8th Cir. en banc), *cert. denied,* 406 U.S. 950 (1972). Population ratios of course are not necessarily appropriate in hiring cases; a proper goal may be smaller or larger than the local population percentage. *See United States* v. *Ironworkers Local 86,* 443 F.2d 544, 553 (9th Cir. 1971), *aff'g* 315 F. Supp. 1202, 1234, 1247 (W.D. Wash. 1970). As the union points out, positions for employment may be so specialized that general population statistics are of little value in setting goals, citing *Mayor of City of Philadelphia* v. *Educational Equality League,* 415 U.S. 605 (1974), *Hester* v. *Southern Railway Co.,* 497 F.2d 1374 (5th Cir. 1974), and our own opinion in *Castro* v. *Beecher,* 459 F.2d 725, 737 (1972). This was apparently the situation in *Rios* v. *Enterprise Ass'n, Steamfitters Local 638,* 501 F.2d 622 (2d Cir. 1974). If these cases stand for the general proposition, as the union argues, that area population is an inadequate measure of the labor pool in certain hiring discrimination cases, it would still remain for the union to demonstrate that the percentage of blacks in the appropriate pool here is lower than their percentage of the general Boston population. This has not been done.

Before the district court, the School Committee's position was that the appropriate goal should be the percentage of black college graduates of all ages, in Boston or in the northeast section of the country, 5.25 and 4.24 percent respectively. Such a goal would have entirely nullified the court's previous finding of constitutional violations in the recruitment and hiring of faculty, as the percentage of black teachers in the Boston system had al-

ready exceeded 7 percent in 1972-73 and the Committee's proposed goals would have permitted backtracking rather than constituting remedial relief. The union objected to the Committee's proposal, however, on the grounds that the pool it was based on was too broad, and proposed instead a pool of all college graduates carrying a Massachusetts certification. The statistic on this pool does not appear to have been presented, but there is no reason to believe that it deviates much from the clearly insufficient 4-5 percent range.

Since no other figures less than 20 percent were presented to the district court, there is no support in the record for the suggestion, only now advanced by the union, that the ratio of blacks in the appropriate pool (now defined as present college students and recent college graduates in the Boston area) is approximately 12 percent. Even assuming that the union's definition is correct, a question we need not decide, the union simply has not presented a convincing case that blacks in fact constitute 12 percent of the pool as so defined. The union reaches its suggested figure by extrapolating from the rise in the percentage of blacks attending college throughout the nation from 1964 to 1972. This figure, however, is also approximately the same as the percentage of blacks in the national population (11 percent). Since there is a higher percentage of blacks in the Boston area, it is likely that there is also a higher percentage of black college students and recent graduates. The union advances no indication that a lower proportion of college students and recent graduates exists in the Boston area black population than nationally. In short, the union has done nothing to rebut the natural inference that the ratio of blacks in the appropriate pool (as the union now defines it) roughly reflects the 20 percent figure chosen by the district court.

We note also that there is no reason to believe that the 20 percent figure was unrealistic. The availability of a substantial number of qualified black applicants (and the district court did not demand the hiring of anyone who was unqualified) was demonstrated by the fact that in the month following the court's first recruitment order on July 31, 1974, the percentage of black faculty was increased from 7.1 to 10.4 percent. This indicates that pessimism as to the prospects of finding qualified black teachers should not be overestimated. As the union points out, there may well be an oversupply of applicants for teaching positions in Boston. While affirmative action to rectify past discrimination is more painful during a time of underemployment than in one of full employment, that fact is no excuse for inadequate action. The goal set by the court has no deadline date. As the court recognized, it contemplates "a gradual increase in the number of black teachers over several years". The prospect of placing 500 additional black teachers in a teaching force of over 5,000 over several years does not seem to us to place an undue burden on the non-minority labor force.

We therefore hold that the district court did not abuse its discretion in selecting a 20 percent hiring goal. Should experience demonstrate over time that even the most diligent efforts fail to make demonstrable progress toward that goal, there will be adequate opportunity to request appropriate relief. Conversely, time may indicate the goal to be too modest. At the moment it must stand as a reasonable judgment on this record. What we have said concerning the hiring goal applies a fortiori to the union's objection to that part of the court's order which requires aggressive recruitment until a 25 percent black teaching staff is obtained. This figure was lower than the 35 percent recommended by plaintiffs; no other ter-

mination point was suggested; and it provides a built-in terminus for court responsibility.

The union also challenges, as imposing an absolute preference, one aspect of the one-for-one hiring method: a "catch-up" provision regarding provisional teachers.[3] Most of the teachers in the system are permanent teachers—a tenured position for which state certification is required. However, Massachusetts law allows (upon a showing of hardship which has been routinely applied for by Boston) the hiring of provisional teachers, who are considered to have tenure after they have been employed three consecutive years. Most of these teachers also have certification, although the primary paper qualification is simply a college degree. The district court order provides for the hiring of permanent teachers on a one-for-one basis, and for a rehiring of provisionals (should Boston choose to rehire them) also on a one-for-one basis. However, due in part to the discriminatory policies found to have been practiced by the School Committee in the past, the number of white provisionals considerably exceeds the number of black provisionals presently in the system. The district court departed from the strict one-for-one requirement to allow all of the unpaired white provisionals to be rehired (should the Committee so choose) before turning to the hiring of new provisionals. Then, in order to restore the balance, the court provided that any new provisionals hired be black, until the number of new black provisionals hired equalled the number of unpaired white provisionals rehired. It is this "catch-up" which the union attacks. Taken in the context of the court's relaxation of the one-for-one contemporaneous

[3] This provision was not explicit in the order reported at 388 F. Supp. 581, but was agreed by the parties to be intended by the phrasing of the order.

hiring order to allow wide latitude to upset the balance in favor of the extra white provisionals, it is clear that this catch-up provision is far from an absolute preference. The Committee is even free to rehire extra white provisionals and hire no new provisionals. Indeed, it has indicated that this is the course it plans to take, filling new vacancies primarily with permanent teachers. The court's order protects any expectations of rehiring the provisionals may have, without jettisoning the one-for-one ratio, and, at most, would result in half the provisionals being black. This sensitive tailoring of the hiring formula is well within the discretion of the court.

Finally, the union objects to the failure of the court to require that black applicants for permanent teaching positions in kindergarten, primary and elementary grades have taken certain reading and methods courses. Although the School Committee has required these courses of new applicants for several years, it cannot be said that failure to have taken them renders the applicant unqualified. To be considered as a permanent teacher, one must possess a Massachusetts certification, for which these courses are not required. The court order further provided for the disqualification of applicants who had previously been found unsatisfactory in a Boston teaching position, or who were rejected after an interview if reasons were specified. There were also specialized requirements for certain fields.

The School Committee may have felt the reading and methods courses were desirable, but it has not appealed from the court's order in this respect. Moreover, teachers hired before 1970 were not subject to this requirement and have not been subsequently obligated to fulfill it. On the other hand, all but two or three black applicants ap-

proved in the summer of 1974 for the relevant grades had in fact completed the courses. Indeed, counsel for the union stated that most majors in education would have taken the courses. His argument was that the impact of the additional course requirements, though minimal, was neutral. The issue becomes minute. The court did not abuse its discretion. The interests of the school system were not sacrificed, and a potential basis for rejecting an otherwise qualified black teaching applicant was removed.

Affirmed.

Appendix B

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

TALLULAH MORGAN ET AL.,
Plaintiffs,

v.

JOHN J. KERRIGAN ET AL.,
Defendants.

CIVIL ACTION

NO. 72-911-G

MEMORANDUM AND ORDERS ON
FACULTY RECRUITING AND HIRING

January 28, 1975

GARRITY, J. In its opinion filed June 21, 1974 in this case, the court found intentional segregation of the Boston public schools by the Boston School Committee and Superintendent of Schools (hereinafter the "city defendants"). One aspect of that segregation was the racial composition and distribution of faculty members in the school system. The court found the low percentage of black teachers to be a result of unconstitutionally discriminatory use of a cut-off score on the National Teacher Examination, inadequate minority recruitment efforts, and the reputation of Boston as an anti-black, segregated school system.

The parties have submitted numerous filings, including proposed findings of fact, as to the proper scope of a long-term remedy that will eliminate the effects of past discrimination and accomplish desegregation in the areas

of faculty hiring and recruitment. Several hearings have been devoted to this subject. Much of the discussion and dispute among the parties has concerned the use of a hiring ratio, a percentage goal for hiring of black teachers and the choice of the appropriate percentage goal. Many of the findings proposed by the parties are directed to this point.

Blacks comprised about 16.32% of Boston's population in 1970, which was an increase from 9.05% in 1960. A reasonable projection from these census figures is that Boston's population now is about 19% black. Black children, however, made up about 35% of the students attending public schools in the school year 1973-74.

In the 1973-74 school year, there were 373 black teachers of a total of 5214, or 7.1%. On July 31, 1974 the court entered an order which was implemented before the opening of school in September 1974. This order required the hiring of one black teacher for each white teacher hired, to the extent that qualified black candidates were available. Implementation of this order has resulted in an increase in the percentage of black teachers in the system to 10.4%.

The propriety of using a population percentage as a goal is legally established in both school cases and other cases where remedies were fashioned for discrimination. *Swann* v. *Charlotte-Mecklenburg Board of Education,* 1970, 402 U.S. 1, 25; *United States* v. *Texas Education Agency,* 5 Cir. 1972, 467 F.2d 848, 873; *Boston Chapter, N.A.A.C.P., Inc.* v. *Beecher,* 1 Cir. 1974, 504 F.2d 1017.

The court has adopted 20%, approximately the black population of Boston, as an appropriate percentage goal for the hiring of black teaching faculty. This goal is below the black student population percentage, 35% in Boston schools, urged by plaintiffs and adopted in some

other school cases, e.g., *United States* v. *Texas Education Agency, supra*; *Keyes* v. *School District No. 1,* C.A. No. C-1499, D. Colo., April 1974, pp. 14-15 of final judgment and decree. The percentage of a minority group in the city's population is the goal adopted in numerous other discrimination cases, e.g., *Boston Chapter N.A.A.C.P., Inc.* v. *Beecher, supra*; *Carter* v. *Gallagher,* 8 Cir. 1971, 452 F.2d 315 (and cases cited therein).

City defendants argue that a percentage goal based on Boston's black population is too high. They suggest that the appropriate goal is at most the percentage of black college graduates in Boston or in the Northeast, which they argue represents the available pool of teachers for Boston teaching positions. Those percentages are about 5.25% and 4.24%, respectively,[1] and are below the present percentage of black faculty in Boston's schools. In our opinion such a goal would not be remedial or equitable.

We note first that the findings in the court's opinion of June 21, 1974 revealed that in the year 1972-73 5.4% of the permanent teachers in the Boston school system were black, a percentage above that proposed by defendants as an appropriate goal.[2] The court found, and the Court of Appeals affirmed, that acts of intentional racial discrimination in recruiting and hiring teachers had occurred. The conclusion is inescapable that without such discrimination there would have been more than a 5.25% or a 4.24% black teaching staff in Boston. Secondly, city defendants' proposed goal would do nothing to elim-

[1] The small percentage of blacks among college graduates may itself be the result of discriminatory practices not at issue in this case.

[2] In that year there were also 143 black provisional teachers out of 710, or 7.15% black teachers of both permanent and provisional status.

inate the effects of the acts of past discrimination found by the court. The court also found that the small number of black teachers in Boston schools, a result of discriminatory practices, was one hallmark of a dual segregated school system. As such, it contributed to the denial of the plaintiff class' rights to equal educational opportunity. To achieve the mandate of the Supreme Court in *Green* v. *County School Board,* 1968, 391 U.S. 430, to eliminate racial discrimination "root and branch", the presence of black teachers in numbers more closely proportionate to the number of black students in the schools is an important step.

The use of hiring ratios and their limited preferential treatment of black applicants in remedying past discrimination has been recognized as a permissible method of fulfilling the court's duty to "render a decree which will so far as possible eliminate the discriminatory effects of the past . . .", *Louisiana* v. *United States,* 1965, 380 U.S. 145, 154. *Boston Chapter N.A.A.C.P., Inc.* v. *Beecher, supra*; *Associated General Contractors, Inc.* v. *Altshuler,* 1 Cir. 1973, 490 F.2d 9; *Castro* v. *Beecher,* 1 Cir. 1972, 459 F.2d 725; *Carter* v. *Gallagher, supra.*

Therefore black and white teachers should be hired on a one-for-one basis until the percentage of black faculty in the schools reaches 20%. This hiring goal does not require the employment of any teacher who does not meet the requirements imposed in the past for teaching in Boston's schools.[3] Further, the goal will provide for a gradual increase in the number of black teachers over several years.[4] In each year, once no more qualified

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[3] A description of past hiring standards appears at pp. 91-96 of the court's June 21, 1974 opinion, 379 F.Supp. 410, 456-59.

[4] Hiring under the court's July 31, 1974 order resulted in a net gain of black teachers when 819 teachers were hired. It would require a further net increase of 242 black teachers to constitute even a 15% black faculty.

black candidates are available to fill teaching vacancies on a one-for-one basis, all remaining vacancies will be filled with qualified teachers of other races.

Provision is first made for an affirmative minority recruitment program, to continue until there is a 25% black faculty. The reason any upper limit is adopted is to provide for the eventual termination of the court's supervision in this area, not because such efforts would not be desirable if continued indefinitely so that the most highly qualified could be selected from a large number of black applicants. These efforts should not terminate with the enforcement of a hiring ratio but should extend to eliminate potential black teachers' views that Boston will hire black teachers only under compulsion.

RECRUITING

The city defendants are ordered to undertake the following steps for the recruitment of additional black applicants for teaching positions in the Boston public schools until 25 percent of the teachers in the Boston public schools are black:

1. *Methods.* The city defendants shall visit colleges with significant numbers of black students who may be eligible for employment as teachers and shall recruit such students to apply for positions in the Boston public schools. During the course of such recruiting visits, the city defendants shall explain to the potential black applicants the opportunities for teaching in the Boston public schools and the application procedure for applying for such positions. Interviews conducted by recruiters shall satisfy any requirement for a personal interview, and applicants so interviewed shall not be required to come to Boston for any other interview. Particular emphasis

shall be placed on those positions in which there are presently few black teachers. The recruiting efforts shall generally include the following activities at the following indicated times:

a. *October - December.* During this period the city defendants shall distribute literature to colleges where potential black applicants are being educated and shall request an opportunity from those colleges to visit the colleges and recruit students. Recruiting trips shall be scheduled during this period.

b. *January - March.* The city defendants shall process the results of their recruiting efforts, and make a preliminary determination of the number of potential black applicants. Based on that determination, the city defendants shall during this time arrange for the scheduling of recruiting trips during the spring.

c. *April - June.* As the areas of particular need within the Boston school system becomes definite, the city defendants shall visit additional campuses and recruit additional black applicants. So long as a black teacher shortage continues to exist as set forth in the section of this order on teacher hiring, the recruiters visiting the campuses shall be authorized to hire on the spot applicants who meet qualifications, subject to a review and disallowance of the hiring within ten days for stated reasons by the Board of Examiners or by the Boston School Committee.

2. *Recruiting Staff.* The city defendants shall appoint a full-time Coordinator of Minority Recruitment who shall be black. He shall have the responsibility for implementing this order and for generally increasing the city defendants' effectiveness in securing black teachers available for permanent or provisional employment. The city defendants shall also appoint two full-time assistants to

the Coordinator. They shall assist the Coordinator in increasing the school system's effectiveness in securing black (and, in the discretion of the city defendants, other minority) teachers available for permanent or provisional employment. They shall assist new black teachers in settling in Boston. The city defendants shall provide a sufficient budget to cover salaries, the employment of necessary clerical staff, recruiting trips, advertising and printing, and other expenses of recruitment. For the academic year 1975-76, this budget shall be not less than $120,000.

The Coordinator and his two full-time assistants shall be assisted from time to time by teams of teachers excused on a temporary basis from their regular duties to assist on recruiting. The city defendants shall train those teachers to prepare them for recruiting.

Black individuals shall be encouraged to apply for the present vacancy on the Board of Examiners.

3. *Federal Assistance.* The city defendants, as part of their general search for federal money to assist desegregation, shall explore all possibilities for applying for federal financial assistance in the recruiting or training of additional minority teachers.

4. *Reports.* The city defendants shall file with the court and with all parties semiannual reports in January and in July of each year, until 25 percent of the teachers in the Boston public schools are black. These reports shall contain a description of the activities undertaken by the city defendants in recruiting additional black applicants for teaching positions.

HIRING

The city defendants are ordered to undertake the following steps for the hiring of additional faculty in the Boston public schools:

5. *Identification of Racial Composition of Staff.* At each grade level (i.e., K-5, 6-8, 9-12) the city defendants shall determine the racial composition of the fulltime professional instructional staff. If that racial composition is less than 20%, a shortage of black teachers shall be deemed to exist.

6. *Hiring of Additional Faculty.* In hiring additional faculty, if a shortage of black teachers exists at a grade level, the city defendants shall hire one black permanent teacher for every white permanent teacher hired at that grade level. In hiring or rehiring provisional teachers, if a shortage of black teachers exists at a grade level, the city defendants shall hire or rehire one black provisional teacher for every white provisional teacher hired or rehired at that grade level; this order, however, shall not prevent the city defendants from rehiring for any year any provisional teacher they employed the year before. The hiring or rehiring of teachers of other minorities shall not count as the hiring or rehiring of a white or a black teacher.

7. *Qualifications.* For purposes of this order, the city defendants shall not be required to hire any teacher who cannot qualify for Massachusetts certification[5] for the position for which the teacher is to be hired, except that, if this is necessary to comply with the second sentence of paragraph 6 of this order, up to 20% of the black provisional teachers hired in any year shall be college graduates who cannot so qualify; no provisional teacher

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[5] The course and performance prerequisites listed in the Circular of Information on the Examination and Certification of Teachers for 1974-75 may also be required for the following specialties: mechanical drawing; science advisor elementary; economics (high); bookkeeping (high); shorthand and typewriting; office practice; teacher of aphasic children; teacher of music (vocal); instrumental instructor.

hired under this exception need be rehired after his or her third year if he or she has not by July 15 of that year obtained certification. The city defendants shall not be required to hire or rehire any teacher who was previously employed in the Boston public schools and who received an unsatisfactory rating.

8. *Unfilled Vacancies.* If the city defendants have complied with the section of this order on recruitment, and if vacancies continue to exist for particular positions on July 15 of any year, then the city defendants may fill all such remaining positions with teachers without regard for the race of those teachers.

9. *Reports.* The city defendants on or before March 15 of each year shall file with the court and with all parties a ranking system by which they propose to rank black applicants for teaching positions, together with a report on the numbers of black and white permanent and provisional teachers then employed at each level. Any objections and counterproposals from any party shall be filed on or before April 1 of each year.

The city defendants beginning on April 15 of each year and on the 15th day of each successive month through October 15 shall file with the court and with all parties a report detailing:

a. the projected number of teaching vacancies in various categories
b. the projected number of permanent and provisional teachers to be hired
c. a summary of applications and interview activity of black applicants
d. the number and race of permanent and provisional teachers hired or rehired.

/s/ W. Arthur Garrity, Jr.
United States District Judge

Appendix C.

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

TALLULAH MORGAN, et al.,
Plaintiffs

v.

JOHN KERRIGAN, et al.,
Defendants

CIVIL ACTION
72-911-G

ORDER ALLOWING INTERVENTION

July , 1974

GARRITY, J. The motions to intervene of John P. Doherty, et al., and of The Boston Association of School Administrators and Supervisors, Local 6 of the School Administrators and Supervisors Organizing Committee AFL-CIO, are granted subject to the following conditions.

1. Intervention is granted only as to issues as to which the intervenors claim contractual rights. In the case of the Administrators' Union, this is the issue of transfer rights; in the case of the Teachers' Union, the issues are teacher hiring, transfer and promotion procedures. Intervenors may participate as amici curiae as to other issues by submitting proposals in writing first to the parties and then to the Court, which may upon application allow oral argument.

2. No intervenor shall reopen any question or issue which has previously been decided by the Court, including the findings of fact and conclusions of law in the Court's opinion of June 21, 1974.

3. The intervenors will not file counterclaims, impleaders, or crossclaims, or seek the joinder of additional parties or the dismissal of present parties, except by leave of Court; any application for such leave shall contain: (a) a showing of the delay expected from such action and the steps proposed to eliminate it; (b) a showing that such action may be taken as of right, or that unusual reasons exist for the Court to exercise its discretion to allow it; and (c) a statement as to whether any counterclaim, impleader or crossclaim should be severed pursuant to rule 42(b), and if not, why not.

4. As appropriate, the Court retains the power to add to or modify the conditions of intervention.

United States District Judge

Appendix D.

Highlights of the Study

1. There are approximately 6,184 educators who became certified in 1973 who are seeking to fill the estimated 1,415 positions which will be added in the public schools during 1974-75. Of the 1,415 new positions, only about one-half are for classroom teachers. Therefore, it appears that there are about 4.3 certified teachers, specialists and administrators for each available new position.

2. The number of available positions in Massachusetts public schools will certainly be greater than 1,415 in September, 1974 due primarily to resignations and retirements. The retirement projection is estimated at about 1,270. However, the 6,184 educators competing for the positions will be increased by persons receiving certification during 1974. They will probably include teacher education graduates in June, 1974, some persons who have received initial certification prior to 1973, and others who will move to Massachusetts having a desire to teach and who are eligible to become certified.

3. Of the 4,777 certified elementary school classroom teachers who were not employed in Massachusetts public schools in October, 1973, it is estimated that 2,742 are seeking positions with varying degrees of intensity. As there are only approximately 261 added elementary school classroom teaching positions which will become available in September, 1974, the problems faced by these persons is acute. There will be approximately 10.5 new teachers per new positions. However, as pointed out above, there will be resignations and retirements as well as 1974 graduates, certified teachers of other years, and persons moving to Massachusetts who are eligible for cer-

tification competing for the positions. This phenomena will probably change the 10.5 ratio but the problem remains serious. There is no estimate of how many of the 1,270 projected retirements are among elementary school classroom teachers.

4. The problem for certified secondary school classroom teachers is also serious but to a lesser degree. It is estimated that 2,501 persons will compete for 396 new secondary school classroom positions. The ratio becomes about 6.3 persons for each new classroom position. This conclusion is based on the same limitations as affect the elementary classroom teacher to position ratio. Again, there is no estimate of the number of projected retirements expected from secondary school classroom teachers.

5. Summary of Basic Estimates	Number	% of 16,500	% of 10,780
Number of educators certified in Massachusetts during 1973.	16,500	—	—
Number of educators certified in 1973 who were not employed in the public schools of Massachusetts during 1973-74.	10,780	65.3	—
Number of educators not employed in the Massachusetts public schools who are actively searching for positions in public schools.	6184	37.5	57.4

Appendix E.

MASS. GEN. LAWS, c. 71, § 38G.

[Standards of Certification of Teachers, Principals, etc.]

The board of education, hereinafter referred to as the board, shall have authority to grant upon application provisional and permanent certificates, as provided in this section, to teachers, principals, supervisors, directors, guidance counselors and directors, school psychologists, school librarians, audio-visual media specialists, unified media specialists, school business administrators, superintendents of schools and assistant superintendents of schools. Each application shall be accompanied by a fee of ten dollars.

Any applicant shall be eligible for a provisional or a permanent certificate who satisfies the requirements of this section and who furnishes the board with satisfactory proof that he (1) is an American citizen, (2) is in good health, provided that no applicant shall be disqualified because of blindness or defective hearing, (3) is of sound moral character, (4) possesses a bachelor's degree or an earned higher academic degree or is a graduate of a four-year normal school approved by the board, and (5) meets such requirements as to courses of study, semester hours therein, experience, advanced degrees and such other requirements as may be established and put into effect by the board; provided, however, that no requirements respecting courses of study, semester hours therein, experience, advanced degrees and other such requirements shall take effect prior to one year subsequent to the promulgation of such requirements by the board.

The first certificate which the board may grant to any eligible applicant shall be a provisional certificate for two years from the date thereof. Before the board grants

any other certificate, the applicant shall be evaluated by an evaluation committee in the manner hereinafter provided.

Each evaluation committee shall be under the auspices of the school committee which employs the applicant and shall consist of persons who hold a permanent certificate or who have been exempted from holding such a certificate under section two of chapter two hundred and seventy-eight of the acts of nineteen hundred and fifty-one. Each evaluation committee shall consist of three persons, one of whom shall be appointed by the school committee, one nominated by the applicant, or, if the applicant so chooses, by the applicable local professional bargaining agent, and appointed by the commissioner of education; and the third shall be appointed by the other two members of the evaluating committee from professionals in the same field as the applicant or as closely allied thereto as possible. In the event the other two do not nominate a third person within ten working days after they have been appointed, the commissioner of education shall appoint a third independent member. Whenever an employee of any school committee, state college or any public agency is appointed to membership on an evaluation committee, his employer shall grant him sufficient leave from his regular duties, without loss of income or any other benefits to which he is entitled by reason of his employment, to attend meetings of the evaluation committee and to perform the duties imposed upon him by reason of his membership on the evaluation committee.

Before an applicant completes a second year of service under his provisional certificate, he shall be evaluated by the evaluation committee described in the preceding paragraph as to his readiness to obtain a permanent certificate in terms of his professional growth and performance. Any

evaluation made by the evaluation committee shall be based on criteria determined by the board. Each evaluation committee shall be established in sufficient time so that its recommendations shall be forwarded to the board not later than January fifteenth of the last school year in which the applicant is able to teach under his provisional certificate.

The evaluation committee may recommend to the board that the applicant be granted a permanent certificate, and if the applicant has met all the other requirements established by the board, the board shall grant the applicant a permanent certificate.

The evaluation committee may, as one of its alternatives, recommend that the applicant's provisional certificate be renewed for an additional two years, and if the applicant has met all the other requirements established by the board, the board shall grant the applicant a renewal of his provisional certificate for two years. No renewal certificate may be granted thereafter. During his second year of service under a renewed provisional certificate the applicant shall be reevaluated in accordance with the provisions that govern the evaluation of an applicant under an initial provisional certificate.

If the evaluation committee recommends that a renewal of the original provisional certificate shall not be granted to an applicant or if the evaluation committee recommends that a permanent certificate shall not be granted to an applicant or the board denies a renewal of a provisional certificate or of a permanent certificate to an applicant because he has not met all the requirements for eligibility as provided in this section, the board shall notify the applicant of the adverse recommendation of the evaluation committee or the denial of certification by the board, and such notice shall be accompanied by a report of the evalu-

ation committee or a report of the reasons for the denial of certification by the board, as the case may be, and a description of the procedures by which the applicant may initiate an appeal before a hearing officer as hereinafter provided and such notice shall be mailed to the applicant by registered or certified mail not later than February first of the year in which the evaluation committee has made its recommendations. The board shall provide the applicant with a list of five qualified hearing officers from which the applicant, if he requests a hearing, may select one person, and the applicant shall so notify the board in writing of his selection of a hearing officer prior to February tenth of such year. The board shall mail the applicant by registered or certified mail a notice stating the time and place of the hearing at least ten days before the scheduled date of the hearing and the hearing shall be held before March twentieth of such year. The board shall employ and compensate a stenographer who shall take stenographic notes of the hearing. The applicant shall be entitled to be represented by counsel and may call witnesses to testify in his behalf and may examine and cross-examine witnesses. It shall be the responsibility of the hearing officer to consider whether the criteria established by the board were adhered to and appropriately applied, and to make a recommendation as to whether or not the evaluation and the determination regarding eligibility should be accepted. The recommendation of the hearing officer and the transcribed record of the hearing shall be reviewed by the board. If the board then decides, based on the facts found by the hearing officer, that the provisional certificate should not be renewed or that a permanent certificate should not be granted, as the case may be, it shall so notify the applicant by registered or certified mail on or before April seventh of such year and

the applicant shall have the right to judicial review as provided in chapter thirty A.

Notwithstanding any provisions of this section to the contrary, a person whose application for a renewal of a provisional certificate or whose application for a permanent certificate has been denied by the board may submit a new application for certification in accordance with the provisions of this section at any time subsequent to two years after the expiration date of his last certificate. A person whose provisional certificate has expired, provided the board has not denied the issuance of a provisional or permanent certificate, may reapply for a provisional certificate immediately.

If an applicant has been employed by a school committee while holding a provisional certificate or a renewal thereof, two years of provisional service shall be credited as service in acquiring the status of serving at the discretion of the school committee as provided in section forty-one; and said two years shall be the last two years the applicant has served under a provisional certificate or a renewal thereof.

A teacher holding a provisional certificate or a renewal thereof shall be employed by a school committee at the level of the regular local salary schedule commensurate with his experience and preparation.

No person shall be eligible for employment by a school committee as a teacher, principal, supervisor, director, guidance counselor and director, school psychologist, school librarian, audio-visual media specialist, unified media specialist, school business administrator, superintendent of schools or assistant superintendent of schools unless he has been granted by the board a certificate with respect to the type of position for which he seeks employment; provided, however, that nothing herein shall be

construed to prevent a school committee from prescribing additional qualifications; and provided further, that a school committee may upon its request be exempt by the board for any one school year from the requirement in this section to employ certified personnel when compliance therewith would in the opinion of the board constitute a great hardship in securing teachers for the schools of a town. During the time that such a waiver is in effect, service of an employee of a school committee to whom the waiver applies shall not be counted as service in acquiring the status of serving at the discretion of a school committee under section forty-one.

For the purpose of certifying provisional teachers, the board may approve programs at colleges or universities devoted to the preparation of teachers and other educational personnel. A college or university offering such an approved program shall certify to the board that a student has completed the program approved and shall provide the board with a transcript of his record.

Any person who is not an American citizen but who otherwise qualifies under this section may be certified by the board to the position of teacher, principal, supervisor, director, guidance counselor and director, school psychologist, school librarian, audio-visual media specialist, unified media specialist, school business administrator, superintendent of schools or assistant superintendent of schools, provided that such person is legally present in the United State and presents to the board a copy of his declaration of intention to become a citizen of the United States, certified by the clerk of the court in which it was filed or a certificate from the Immigration and Naturalization Service of the United States showing that he has declared his intention to become such citizen. Any certificate issued under this paragraph shall be valid for a two-year period, re-

newable for a maximum of two times and subject to the same provisions for renewal as are prescribed for provisional certificates. Two years of service by a teacher certified under this paragraph shall be counted as service in acquiring the status of serving at the discretion of the school committee as provided in section forty-one.

This section shall not apply to trade, vocational, temporary substitute teachers or exchange teachers, or to teaching or administrative interns from an institution of higher learning in the commonwealth, provided approval for the employment of such personnel shall be granted by the board under such rules and regulations as it may adopt. As used in this section, a "temporary substitute" shall be one employed for less than a school year to take the place of a regularly employed teacher who is absent by reason of illness or by reason of educational leave, maternity leave, military leave, sabbatical leave or other leave. As used in this section, a "teaching or administrative intern" shall be a student who has completed his student teaching requirements and seeks additional experience in part-time teaching or administrative positions.

Any certificate issued by the board may be revoked for cause, pursuant to standards and procedures established by rules and regulations of the board.

The board shall have authority from time to time to make, amend and rescind such rules and regulations as may be necessary to carry out the provisions of this section.

Except as otherwise specifically provided in this section, no rights of any employees of a school committee under the provisions of this chapter shall be impaired by the provisions of this section.

[Amended by 1972, 64, approved March 9, 1972, effective 90 days thereafter; 1972, 684, § 5, approved, with emergency preamble, July 13, 1972; by § 136 it took effect on July 31, 1972; 1973, 847, § 5, approved Sept. 28, 1973, effective 90 days thereafter.]

In the Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1527

JOHN P. DOHERTY, ET AL.,
INTERVENORS-PETITIONERS,

v.

TALLULAH MORGAN, ET AL.,
PLAINTIFFS-RESPONDENTS,

and

JOHN J. McDONOUGH, ET AL.,
DEFENDANTS-RESPONDENTS.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR RESPONDENTS TALLULAH MORGAN, ET AL., IN OPPOSITION

LAURENCE S. FORDHAM, J. HAROLD FLANNERY,
JOHN LEUBSDORF
(FOLEY, HOAG & ELIOT);
ROBERT PRESSMAN, ERIC E. VAN LOON
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BRIEF FOR RESPONDENTS TALLULAH MORGAN, ET AL., IN OPPOSITION

The plaintiffs-respondents Tallulah Morgan, et al., black parents and their children attending the Boston public schools, oppose the petition for certiorari.

Statement of the Case

This Petition seeks review of relief for systematic hiring discrimination which had rendered the permanent teaching staff of the Boston public schools 95% white. That discrimination was part of a system-wide Constitutional violation which also included teacher segregation, student segregation, and denials of equal educational opportunity. *Morgan* v. *Hennigan*, 379 F. Supp. 410, 456-66 (D. Mass.), *aff'd*, 509 F.2d 580, 595-98 (1st Cir. 1974), *cert. denied*, 421 U.S. 963 (1975). The District Court ordered that — to the extent qualified black teachers are available — they receive half of the available teacher positions until 20% of the teaching staff is black (App. 22-30). The Court of Appeals affirmed the District Court's remedial order (App. 13-21), and the Boston Teachers Union petitions for further review here.

The District Court's goal of a 20% black teaching staff roughly equals the percentage of black people in the Boston population (App. 14). It is substantially less than the percentage of black students in the Boston public schools, which is about 35% (App. 23). In the District Court, the Union (petitioner here) and school officials argued that the appropriate goal was about 4-5%, a figure rejected by the District Court because (*inter alia*) it was *less* than the percentage of black teachers already employed in the Boston schools and wholly inconsistent with the Court's previous violation findings (App. 16-17, 24-25). In the Court of Appeals, the Union shifted its position and suggested that a 12% goal was appropriate, arguing that blacks constitute about 12% of the "pool" of those qualified for teaching positions (App. 17). The Court of Appeals noted that the 12% figure had not been suggested to the District Court and was not supported by the record, concluding that "the union simply has not

presented a convincing case that blacks in fact constitute 12 percent of the pool as so defined" as opposed to 20% (App. 17). The Court of Appeals thus did not deny the possible relevance of "pool" statistics, but found the Union's evidentiary showing unpersuasive.[1]

The District Court's relief instituted a hiring goal, not a quota: only to the extent that *qualified* black applicants are available are the defendants required to hire one of them for each white teacher hired, until a 20% teaching staff is attained (App. 29). No black teacher is deemed qualified for a permanent post[2] unless he or she possesses Massachusetts certification, which in turn requires a college degree, specified courses, and student teaching experience (App. 29, 35; Record Appendix on Appeal, p. 228). In some instances, even a certified teacher need not be hired unless he or she has taken certain additional courses (App. 29 n. 5). And the defendants may reject any black candidate after an interview if reasons are specified (App. 20, 27).

The defendants have at no time proposed any alternative hiring system which is even validated under the principles of *Albemarle Paper Co.* v. *Moody,* 422 U.S. 405, 425-36 (1975), much less one promising realistically to remedy the effects of past discrimination. In the District Court, the defendants argued that there were already more than enough black teachers (App. 16-17, 24). The present petition does not state what form of relief the Union would consider acceptable.

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[1] In this Court, the Union does not advance *any* specific percentage as the appropriate goal for relief, though it does mention in passing (p. 5) still a third figure, 13%.

[2] Like the Petition (p. 4 n. 1), this brief will not discuss provisional teachers.

Argument

I. This Is an Inappropriate Case to Consider Percentage Relief for Hiring Discrimination.

Even should the Court be disposed to deal with the scope and propriety of hiring ratio relief for employment discrimination, this is not the case in which to do it.

First, this is a school segregation case, not just a hiring discrimination case, and conclusions in this case may not be generally applicable. Black children have a strong interest in attending a school system free of faculty discrimination (*Rogers* v. *Paul,* 382 U.S. 198 (1965)), and in attending such a school system *now* (e.g., *Swann* v. *Charlotte-Mecklenburg Bd. of Educ.,* 402 U.S. 1, 13-14, 19-20 (1971)). For this reason and others discussed in part III below, it is vital that relief for teacher hiring discrimination have a substantial immediate effect, which hiring ratios are particularly suited to do.

Second, this is an unusual hiring discrimination case because it arises under the Fourteenth Amendment, and not under Title VII of the Civil Rights Act of 1964. After this suit was filed, Title VII was amended to include government employees (42 U.S.C. § 2000e(a); P.L. 92-261, § 2(1)), so that future cases will not be similarly limited. In this case, the Court would not be able to limit its decision to a statutory ground. Nor would it have before it section 703(j) of Title VII, 42 U.S.C. § 2000e-2(j), and the legislative history bearing on the propriety of hiring ratio relief. See, e.g., *Boston Chapter, N.A.A.C.P., Inc.* v. *Beecher,* 504 F.2d 1017, 1027-28 (1st Cir. 1974), *cert. denied,* 421 U.S. 910 (1975); *United States* v. *Local Union No. 212,* 472 F.2d 634, 636 (6th Cir. 1973).

Third, the Union and its officers lack standing to seek review.[3] The order is not addressed to them, does not

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[3] This point was not raised below, but may nevertheless be considered here. See *Sosna* v. *Iowa,* 419 U.S. 393, 397-403 (1975).

deprive them of their jobs, and does not impair their collective bargaining agreement, which does not regulate hiring standards. It is true that the order may impair the chances of some white provisional teachers in the bargaining unit to obtain permanent employment, but by the same token it increases the chances of black provisionals to obtain such employment. (A provisional is an untenured teacher hired on a one-year contract.) The Union cannot represent the interests of white provisionals when it owes an equal duty to black provisionals. See *Warth* v. *Seldin*, 422 U.S. 490, 502, 510-14 (1975); *Hansberry* v. *Lee*, 311 U.S. 32 (1940); *Steele* v. *Louisville & N. Ry.*, 323 U.S. 192 (1944); *Air Line Stewards* v. *American Airlines, Inc.*, 490 F.2d 636 (7th Cir. 1973), *cert. denied*, 416 U.S. 993 (1974); Mass. G.L. c. 151, § 4(2). The Boston School Committee, to which the District Court's order was addressed, did not appeal.

II. The 20% Hiring Goal Was Not an Abuse of Discretion and Raises No Issue Warranting Review.

Selecting a particular percentage of minority employees as the goal for hiring discrimination relief is necessarily within the District Court's discretion. It is simply impossible to lay down one final formula for relief. A great variety of factors — the nature and extent of the violation, the minority percentage in the local population, special features of the working force, the requirements of the job, the practicability of relief, the other characteristics of the remedial order, the order's impact on various groups, and so on — may be relevant.[4] The choice of a

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[4] This case does not raise the question of whether lower court discretion should be directed in the way set forth in *Franks* v. *Bowman Transp. Co.*, 44 U.S.L.W. 4356 (1976) and *Albemarle Paper Co.* v. *Moody*, 422 U.S. 405, 421 (1975).

specific figure must be left to the District Court with review only for abuse of discretion.

It is impossible to find an abuse of discretion here, much less an issue warranting review by this Court. The 20% goal established by the District Court coincided with the percentage of black people in Boston, and was thus consistent with the numerous cases which have used goals roughly equalling the local minority population. App. 15-16 (citing cases); *Crockett* v. *Green,* 12 F.E.P. Cas. 1078 (7th Cir. 1976); *Erie Human Relations Comm'n* v. *Tullio,* 493 F.2d 371, 374-75 (3rd Cir. 1974); *Arnold* v. *Ballard,* 390 F. Supp. 723, 726, 736 (N.D. Ohio 1973); *Dozier* v. *Chupka,* 395 F. Supp. 836, 860 (S.D. Ohio 1975); *Davis* v. *County of Los Angeles,* 8 F.E.P. Cas. 239, 242 (C.D. Calif. 1973); *Reed* v. *Lucas,* 11 F.E.P. Cas. 153, 156 (E.D. Mich. 1975).

The union's argument that blacks compose less than 20% of the "pool" of qualified applicants was not held irrelevant below; it was rejected on the facts for insufficiency of evidence (App. 16-17), leaving no issue for review here. In the District Court, the Union and School Committee argued that no goal above 5% would be proper (App. 16-17). This theory was properly rejected, since it "would have entirely nullified the court's previous findings of constitutional violations in the recruitment and hiring of faculty, as the percentage of black teachers in the Boston system had already exceeded 7 percent in 1972-73 and the Committee's proposed goals would have permitted backtracking rather than constituting remedial relief" (App. 16-17; see 24). The 5% theory — typical of the defendants' defaults when it came to proposing relief (509 F.2d 618; 401 F. Supp. 216, 224-29) — came with particular inappropriateness from the Union, since the terms of its intervention forbid it to relitigate the violation findings in this case (App. 31).

The Union's suggestion in the Court of Appeals that analysis of the "pool" might support a hiring goal of 12% was not only untimely (App. 16-17) but factually unfounded. The Union derived its 12% figure from the estimated percentage of the current nationwide college population which is black (Petition, p. 5; App. 17). But, as Chief Judge Coffin explained (App. 17):

> "This figure, however, is also approximately the same as the percentage of blacks in the national population (11 percent). Since there is a higher percentage of blacks in the Boston area, it is likely that there is also a higher percentage of black college students and recent graduates. The union advances no indication that a lower proportion of college students and recent graduates exists in the Boston area black population than nationally."

It cannot avail the Union to cite (Petition, p. 6) statistics on the number of recently certified Massachusetts teachers without jobs, since there is no evidence of their race. Nor does it help to cite (p. 5) data on the percentage of blacks in various groups of people 25 years old or more in 1970, since teachers are hired in Boston from among recent college graduates and the percentage of college students who are black has been rising. These are simply attempts to relitigate here factual matters decided adversely to the Union below.

The 20% goal was especially appropriate here since it came as part of desegregation relief in a school system whose students are 35% black (App. 23). It is difficult to remedy intertwined constitutional violations which sidetracked black people at every level of the system when the faculty remains 90% white (App. 23). Even in the absence of proof of hiring discrimination, some desegregation

courts have acted to increase (*Davis* v. *School Dist. of Pontiac*, 474 F.2d 46, 487 F.2d 890 (6th Cir. 1973); *Smith* v. *St. Tammany Parish School Bd.*, 448 F.2d 414 (5th Cir. 1971)) or stabilize (e.g., *Singleton* v. *Jackson Munic. Sep. School System*, 419 F.2d 1211 (5th Cir.), *rev'd in other respects*, 396 U.S. 290 (1969)) the number of black staff members. Other courts have used the percentage of minority students as a benchmark for appraising hiring discrimination claims or shaping relief. App. 15 (citing cases); see *Jackson* v. *Wheatley School Dist.*, 430 F.2d 1359, 1363 (8th Cir. 1970); *Porcelli* v. *Titus*, 431 F.2d 1254, 1257-58 (3rd Cir. 1970). The courts here stopped well short of that percentage.

The 20% goal, lastly, was thoroughly practicable. Experience with interim relief during the summer of 1974 showed that even a hasty, one-month attempt could increase the percentage of black teachers from 7.1% to 10.4% (App. 18, 23).[5] Undisputed evidence shows, moreover, that in many cities even outside the South (where black schools were usually staffed entirely by blacks) the percentage of black teachers is at least as high as the percentage of blacks in the local population. See Appendix to this brief. Where two lower courts have found a 20% goal feasible and equitable, there is no occasion for this court to resift the record in order to review what amounts to a claim that the lower courts found certain factual inferences from 1970 census data less persuasive than the Union wishes appropriate. Since the factual premises of

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[5] The 7.1% starting figure includes provisional teachers, and hence differs from the 5% figure used elsewhere in this brief (see App. 24 & n. 2). The Petition (p. 6), incidentally, improperly refers to 1975 hiring experiences which occurred *after* the hiring order was entered, and which in any event prove only the School Committee's poor compliance. The order's requirement of two assistant recruiters (App. 27-28) was not complied with until four months after the order issued, and even then only after a second order.

the Union's claim were rejected below, and since the choice of a particular percentage goal was in any event within the Court's discretion, certiorari should be denied.

III. The Use of Hiring Ratios to Remedy Constitutional Violations Presents No Issue Warranting Review in This Case.

When employment discrimination has been shown, many courts have upheld the use of hiring ratios as a remedial measure. E.g., *Boston Chapter, N.A.A.C.P., Inc.* v. *Beecher,* 504 F.2d 1017, 1026-28 (1st Cir. 1974), *cert. denied,* 421 U.S. 910 (1975); *Rios* v. *Enterprise Assoc. Steamfitters,* 501 F.2d 622 (2d Cir. 1974); *Erie Human Relations Comm'n* v. *Tullio,* 493 F.2d 371 (3rd Cir. 1974); *Morrow* v. *Crisler,* 491 F.2d 1053 (5th Cir. 1974) (*en banc*), *cert. denied,* 419 U.S. 895 (1975); *United States* v. *Masonry Contractors Ass'n,* 497 F.2d 871, 877 (6th Cir. 1974); *Crockett* v. *Green,* 12 F.E.P. Cas. 1078 (7th Cir. 1976); *Carter* v. *Gallagher,* 452 F.2d 315, 327-31 (8th Cir. 1971) (*en banc*); *United States* v. *Ironworkers Local 86,* 443 F.2d 544, 552-53 (9th Cir. 1971) (*affirming* 315 F. Supp. 1202, 1247).

Such relief complies with the principle that "the Court has not merely the power but the duty to render a decree which will so far as possible eliminate the discriminatory effects of the past as well as bar like discrimination in the future." *United States* v. *Louisiana,* 380 U.S. 145, 155-56 (1965); *Albemarle Paper Co.* v. *Moody,* 422 U.S. 405, 418 (1975). This is not a case in which "affirmative action" programs have been instituted without a showing of past discrimination. Cf. *De Funis* v. *Odegaard,* 416 U.S. 312 (1974); *Morton* v. *Mancari,* 417 U.S. 535 (1974) (employment preference for certain Indians upheld). Here, as a result of systematic discrimination (379 F. Supp. at 456-66) linked with other Constitutional violations, 95%

of the permanent teaching positions had been preempted by white employees before relief began (App. 24). All the District Court did was to require that, to the extent new vacancies appear and *qualified* black applicants are found, they receive half the available openings until black teachers constitute a reasonable proportion of the staff. (For an outline of the required qualifications, see Statement of the Case, above.) The goal was simply to undo the effects of past discrimination. Cf. *Swann* v. *Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 19-20, 22-25 (1971); *Kahn* v. *Shevin*, 416 U.S. 351 (1974).

This case did not require the courts to balance equities between black applicants and white employees hired under the discriminatory system, since the employment and seniority of those already hired were not affected. Eliminating the effects of discrimination could be accomplished without harm to white beneficiaries of that discrimination. Compare *Franks* v. *Bowman Transp. Co.*, 44 U.S.L.W. 4356 (1976). The courts also considered the effect of the order on white applicants who had merely a hope of employment (App. 18):

> "The goal set by the court has no deadline date. As the court recognized, it contemplates 'a gradual increase in the number of black teachers over several years'. The prospect of placing 500 additional black teachers in a teaching force of over 5,000 over several years does not seem to us to place an undue burden on the non-minority labor force."

That this is a school desegregation case made vigorous affirmative relief particularly appropriate. Students are entitled to a teaching force free of discrimination now, not years after they graduate. See *Rogers* v. *Paul*, 382 U.S. 198 (1965); *Swann*, 402 U.S. at 18-20. Children and

parents should not be left to meet the challenges of desegregation with an overwhelmingly white staff whose composition is itself the effect of past discrimination.

In this case, moreover, there were no effective alternatives to the use of hiring ratio relief. Boston's previous hiring system focused on an examination whose discriminatory potential has been widely condemned.[6] That system had been held unconstitutional by the District Court (379 F. Supp. at 463-65) and Court of Appeals (509 F.2d 580, 596-98 (1st Cir. 1974), *cert. denied*, 421 U.S. 963 (1975)). No validated alternative system was presented. There was not even an assertion that one was in process of development or validation. The defendants argued that there were already more than enough black teachers (App. 16-17, 24). "In default by the school authorities of their obligation to proffer acceptable remedies, a district court has broad power to fashion a remedy that will assure a unitary school system." *Swann*, 402 U.S. at 16. All reasonable means were available to the court. *Hills* v. *Gautreaux*, 44 U.S.L.W. 4480, 4484 (1976).

The Boston School Committee's recalcitrance and evasion, finally, made objective and enforceable remedial standards essential. The School Committee had sabotaged its own minority recruitment program (379 F. Supp. at 464-65). Its proposed remedial goal "would have entirely nullified the court's previous finding of constitutional violations in the recruitment and hiring of faculty . . . and . . . would have permitted backtracking rather than constituting remedial relief" (App. 16-17). Its persistent obstruction of desegregation measures had culminated in

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[6] *Walston* v. *County School Bd.*, 492 F.2d 919 (4th Cir. 1974); *Baker* v. *Columbus Munic. Sep. School Dist.*, 462 F.2d 1112 (5th Cir. 1972); *United States* v. *North Carolina*, 400 F. Supp. 343 (N.D. Cal. 1975) (three-judge court); *Georgia Assoc. of Educators, Inc.* v. *Nix*, 407 F. Supp. 1102 (N.D. Ga. 1976) (three-judge court).

contempt of court only a few weeks before the hiring order issued. 379 F. Supp. at 418-20, 430-32, 440-41, 450-55, 476-77; *Morgan* v. *Kerrigan,* 401 F. Supp. 216, 224-29 (D. Mass. 1975), *aff'd,* —— F.2d —— (1st Cir. 1976) (No. 75-1184), *petitions for cert. pending* (Nos. 75-1441, 75-1445, 75-1466); *Morgan* v. *Kerrigan,* 509 F.2d 618 (1st Cir. 1975). Its members openly avowed that they would do nothing not specifically ordered by the Court. 401 F. Supp. at 226; *Morgan* v. *Kerrigan,* —— F.2d —— (1st Cir. 1976) (No. 75-1184) (slip opinion at 43-44). To have given these officials anything but a precise and enforceable mandate would have been entrusting the cabbage patch to the goat.

Conclusion

The District Court's hiring order (App. 22-30) was just part of complex relief designed to deal with a complex constitutional violation involving every part of the Boston public schools. See *Morgan* v. *Hennigan,* 379 F. Supp. 410 (D. Mass.), *aff'd,* 509 F.2d 580 (1st Cir. 1974), *cert. denied,* 421 U.S. 963 (1975) (violation findings). Relief has been resisted every step of the way, as the petitions seeking review here can attest (Nos. 75-1441, 75-1445, 75-1466). The present petition concentrates on the particular percentage goal for black teachers set by the District Court — a matter plainly within its discretion, in which the Union first sought improper relitigation of the violation findings (App. 16-17), then shifted its position on appeal (App. 17), and now wishes this Court to review the finding that "the union simply has not presented a convincing case" (App. 17) for the factual claims on which its arguments rest. On such a record, no issue of law warranting this Court's attention can be erected. As for the District Court's use of hiring ratio relief,

such relief is supported by extensive precedent, is peculiarly appropriate in a desegregation case in which the local school authorities have obstructed relief, and was almost compelled here by the absence of alternatives. More basically, the absence of Title VII grounds in this case and its desegregation context make it an unsuitable vehicle for approaching the issues of hiring ratio relief, even should this Court now wish to confront those issues. The courts close to the situation have carefully fashioned relief appropriate to the pervasive violation; there is no occasion for further review by this Court.

Respectfully submitted,

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APPENDIX

*Nonsouthern cities in which the percentage of black teachers is comparable to the percentage of black people in the population.**

	Population % Black	*Teacher % Black*
Baltimore	46.4	56.5
Chicago	32.7	34.2
Cleveland	38.3	38.2
Detroit	43.7	41.4
District of Columbia	71.1	79.5
Gary	52.8	59.6
Indianapolis	18.0	22.7
Kansas City, Mo.	22.1	34.5
Philadelphia	33.6	32.2
St. Louis	40.9	53.4

* These statistics come from an exhibit based on Census and Department of Health, Education and Welfare data for 1970. This uncontradicted exhibit (Court of Appeals Record Appendix, pp. 133-34) also includes data on 12 similar Southern cities.